No. 17-961

In the Supreme Court of the United States

THEODORE H. FRANK and MELISSA ANN HOLYOAK,

Petitioners,

v.

PALOMA GAOS, on behalf of herself and all others similarly situated, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONERS' OPPOSITION TO ROY A. KATRIEL'S MOTION FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT AS *AMICUS CURIAE* AND FOR DIVIDED ARGUMENT

As Supreme Court Rule 21.4 permits, Petitioners Theodore H. Frank and Melissa Ann Holyoak oppose the motion of Roy A. Katriel for leave to participate in oral argument as *amicus curiae* and for divided argument. Katriel's *amicus* brief in fact supports the respondents, but his idiosyncratic argument to deny class-action-settlement objectors appellate standing was not advanced by either respondent because it is frivolous. As such, Katriel's participation would not assist the Court.

1. Katriel asserts that he is "*amicus curiae* in support of neither party." But he seeks to argue that no objector to a Rule 23(b)(3) settlement has constitutional standing to appeal a district court's approval of a class-action settlement overruling his or her objection. This unprecedented position would preclude appellate judicial

review of any opt-out class-action settlement, and is thus actually in support of respondents and their settlement. Petitioners therefore object to any designation of Katriel as arguing "in support of neither party." Katriel's brief cover calls himself a "former professor," but his argument would support his current work as a class-action litigator, where he has previously sought, by artificially depressing the number of claims and capping payouts to individual class members, to divert millions of dollars of his clients' money to *cy pres* for another *amicus*, the American Bar Association, through *cy pres*. *Park v. Thomson Corp.*, No. 05-cv-2931, 2008 WL 4684232, at *1–*2 (S.D.N.Y. Oct. 22, 2008). While the *Park* district court rejected Katriel's breach of fiduciary duty to his class clients, the Ninth Circuit's standard in this case would affirm a district court's decision to disregard "possible" alternatives that actually pay the class. Pet. App. 9.

2. If Katriel's position, which no appellate court has adopted, had even far-fetched merit, respondents would have every incentive to raise the argument and shield their settlement from this Court's review. *E.g.*, Gaos Merits Br. 54–56 (seeking dismissal of writ as improvidently granted). But in nearly 30,000 words, respondents ignore it. For good reason. Katriel's argument is "frivolous." *Eubank v. Pella Corp.*, 753 F.3d 718, 729 (7th Cir. 2014) (Posner, J.); *Poertner v. Gillette Co.*, 618 Fed. Appx. 624, 627–28 (11th Cir. 2015). Katriel's *amicus* brief mentions neither *Eubank* nor *Poertner*, and he only belatedly acknowledges *Eubank* in his motion after Petitioners pointed out his *amicus* brief's omissions in informing him that they would oppose his motion for oral argument.

3. The Katriel *amicus* brief and motion have similar glaring omissions when they imagine a non-existent circuit split on the applicability of *Devlin v. Scardelletti*, 536 U.S. 1 (2002), to Rule 23(b)(3) actions. Katriel Br. 21–22; Katriel Mot. ¶ 3. In reality, every federal court of appeals to rule on the question has applied *Devlin* to (b)(3) actions. *Eubank*, 753 F.3d at 729; *Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund*, 582 F.3d 30, 39–40 (1st Cir. 2009); *Fidel v. Farley*, 534 F.3d 508, 512–13 (6th Cir. 2008); *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 572–73 (9th Cir. 2004); *In re Integra Realty Res., Inc.*, 354 F.3d 1246, 1257 (10th Cir. 2004); *cf. also Farber v. Crestwood Midstream Partners L.P.*, 863 F.3d 410 (5th Cir. 2017) (narrowing scope of *Devlin* to reject jurisdiction over appeal of objector who objected to Rule 23(b)(3) settlement late, while assuming court would have had jurisdiction over a timely objection). And, contrary to Katriel's claims, the Eighth and Eleventh Circuits have not hesitated to find jurisdiction to rule on the appeals of settlement approvals by Rule 23(b)(3) objectors in more recent decisions a decade after their dicta musing about the scope of *Devlin*. *E.g.*, *Poertner*, *supra*; *compare also In re Target Data Breach Liab. Litig.*, 847 F.3d 608 (8th Cir. 2017) *with In re Target Data Breach Liab. Litig.*, No. 15-3915 (8th Cir. Jan. 26, 2016) (dismissing appeal upon finding that appellant was not a class member). There is no split among the federal circuit courts of appeal.

4. These courts hew faithfully to *Devlin*. While *Devlin* mentioned a mandatory class as a "particular[]" reason to permit appellate standing, it was only one of several reasons given by the Court for its ruling, and the others are equally

applicable to (b)(3) actions. *Devlin*, 536 U.S. at 11, 6–14. Devlin's animating principle is that absent class members have a justiciable stake by virtue of having their claims released as part of the settlement. *Id.* at 6–7. Regardless of whether class members are given the opportunity to opt out, releases in mandatory and non-mandatory settlements operate the same way, binding class members, extinguishing their rights of action. Releasing such claims notwithstanding a class member's disapproval, as expressed through objection, constitutes an injury-in-fact. "It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing." *Id.* at 10. Objector appeals simply "do[] not implicate" any concerns of Article III standing. *Id.* at 6; *accord In re Subway Footlong Sandwich Mktg. Litig.*, 869 F.3d 551, 555 (7th Cir. 2017) (Sykes, J.).

5. Indeed, even before *Devlin*, no appellate court ever hinted at Katriel's position that intervention would not save the appellate standing of an objector; not even the *Devlin* dissenters suggested that. "Class members suffer injury in fact if a faulty settlement is approved, and that injury may be redressed if the court of appeals reverses. What more is needed for standing?" *In re Navigant Consulting, Inc., Sec. Litig.*, 275 F.3d 616, 620 (7th Cir. 2001) (Easterbrook, J.).

6. Katriel's theory that objectors have engaged in a "voluntary election" to participate in a settlement and thus have no injury is simply a misstatement of law. Rule 23 is an opt-out device, unlike, for example, the collective action mechanism of the Fair Labor and Standards Act (29 U.S.C. § 216(b)), so no such election exists.

Class members are joined without any voluntary action. Inaction in response to an opt-out opportunity does not equate to consent. *Oxford Health Plans LLC, v. Sutter*, 569 U.S. 564, 574–75 (2013) (Alito, J., concurring).

7. Moreover, even if Katriel's characterization of a Rule 23(b)(3) objector as voluntarily electing to participate in a settlement were accurate, it would not necessarily deprive the objector of standing under this Court's precedents. Katriel's *amicus* brief neglects to discuss the unanimous *Havens Realty v. Coleman*, 455 U.S. 363 (1982). *See generally* 13A Charles A. Wright, et. al, *Federal Practice and Procedure* § 3531.5 (2018) (discussing doctrine of "self-inflicted" injuries).

8. Katriel's argument further contradicts without discussing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985), which holds that "minimal procedural due process protection" requires that absent class members must have "an opportunity to be heard" in objection to a settlement in *addition* to the opportunity to opt out. But under Katriel's theory, class-member objectors to an opt-out settlement have no Article III standing to challenge it because of their "voluntary election" not to opt out, and thus there would never be "an opportunity to be heard." To state the proposition is to refute it.

9. Katriel's question of Article III standing of objectors, if presented conventionally to the Court in a petition for a writ of *certiorari*, would have no chance of success, even if it were more forthright than Katriel's briefing has been to date. Supreme Court Rule 10. The natural conclusion is that there is no need to hold argument in a *different* case on the collateral question when Katriel would have no

chance of getting a hearing if the question were squarely presented in a *certiorari* petition. And it certainly does not present the "exceptional circumstance" permitting such an argument to come over the objection of all of the parties to the case. Supreme Court Rule 28.7.

10. The two sets of respondents have moved to divide argument time; in addition, the solicitor general seeks divided argument to argue on behalf of neither side. Petitioner has consented to these requests. It would not be helpful to the Court to have a fifth arguing attorney, whose *amicus* brief fails to mention, much less discuss or grapple with, the most relevant precedents; and who seeks to argue an idiosyncratic position no party in this case, no court, no dissenting Supreme Court justice, and no academic law-review article has ever taken.

For these reasons, Katriel's motion should be denied.

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Respectfully submitted,

THEODORE H. FRANK
Counsel of Record
COMPETITIVE ENTERPRISE INSTITUTE
1310 L St., N.W., 7th Floor
Washington, D.C. 20005
(202) 331-2263
ted.frank@cei.org
Counsel for Petitioners